Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1401

PAUL LEE SWEENY,

Petitioner,

v.

FRANCIS D. LENTINI,
LAWRENCE R. KEENAN, and
GLEN SHENK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COME NOW Respondents, by counsel, and file this their Brief in Opposition to the Petition for a Writ of Certiorari previously filed herein.

QUESTIONS PRESENTED

1. Does *Imbler v. Pachtman* render the Petition for a Writ of Certiorari moot?

2. Does every party have an absolute right to oral argument of Motions for Summary Judgment irrespective of the facts and circumstances of the case?

3. Does a housing official who, in good faith, follows the directions and orders of a prosecuting attorney in obtaining multiple summonses for continuing building code violations traverse the § 1983 rights of the building code violator?

STATUTORY PROVISIONS INVOLVED

§ 122.3 BOCA Basic Building Code (1970), as amended:

122.3 Violation Penalties: Any person who shall violate a provision of the Basic Code or shall fail to comply with any of the requirements thereof or who shall erect, construct, alter or repair a building or structure in violation of an approved plan or directive of the building official, or of a permit or certificate issued under the provisions of the Basic Code, shall be guilty of a misdemeanor, punishable by a fine of not more than -- dollars or by imprisonment not exceeding one (1) year, or both such fine and imprisonment. Each day that violation continues shall be deemed a separate offense.

§ 1309.1 BOCA Basic Building Code (1970), as amended:

1309.1 Grading of Lot: When a building has been demolished and no building operation has been projected or approved, the vacant lot shall be filled, graded and maintained in conformity to the established street grades at curb level. The lot shall be maintained free from the accumulation of rubbish and all other unsafe or hazardous conditions which endanger the life or health of the public; and provisions shall be made to prevent the accumulation of water or damage to any foundations on the premises or the adjoining property.

PERTINENT RULES

Fed. R. Civ. P. 78:

MOTION DAY

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements or reasons in support and opposition.

Local Rules of Prac., 11R, U.S. Dist. Ct., E.D. Va. (1973):

(R) *Determination of Motions Without Oral Hearing:* In accordance with Rule 78, Federal Rules of Civil Procedure, all motions submitted upon written statements of reasons in support and opposition may be determined without oral hearing.

STATEMENT OF THE CASE

Respondents find Petitioner's statement of the case lacking in many particulars and would call the Court's attention to the following facts:

Petitioner-attorney Sweeny owns 4.9 acres of investment property in Oakton, Fairfax County, Virginia, and, when he acquired the property in 1956, it was

improved by an old broken down farmhouse underneath which lay a root cellar. After much ado, the Petitioner finally razed the house but refused to remove the remaining debris. The photographs of the property after the structure was demolished, introduced into evidence below, are worth a thousand words of an attempted description of the danger posed to young children who might adventure upon the junk, debris, and rotten lumber maintained by Petitioner over the now hidden root cellar.

Respondent Lentini, a housing and licensing official, together with other Fairfax County officials, tried to get Petitioner to remove the debris and fill the cellar. They wrote letters, made telephone calls, and held hearings; but Petitioner steadfastly refused to do anything about the situation. Therefore, after Petitioner lost before the Zoning Appeals Board, Respondent Lentini, charged with enforcing the housing regulations, after first securing approval and direction from the Commonwealth Attorney's office, secured a summons for Petitioner and photographed the premises. In the Fairfax General District Court (county court), Petitioner deftly argued that the photographs were inadmissible because a search warrant was not secured to permit their being taken; and he prevailed. Judge Whitestone, however, clearly informed Lentini that he could obtain a further warrant because Petitioner was committing a separate offense each day. (Affidavit of Robert C. Whitestone)

Lentini then checked with Assistant Commonwealth Attorney Davis who personally approved and drew the search warrant and then a summons for a § 1309.1 BOCA Code violation. (Affidavit of Gary Davis) This time, the crafty Petitioner argued that he was not

re-served with a notice that he was violating § 1309.1; and Judge Hurst dismissed the second warrant for that reason; but observe, Judge Hurst specifically stated in his May 9, 1974, letter-opinion, "I feel that your argument of double jeopardy does not apply to the case in hand, since Sec. 122.3 states that each day a violation continues, it shall be deemed a separate offense, and therefore double jeopardy would not attach." (Def. Ex. D-17)

Lentini then again checked with Assistant Commonwealth Attorney Davis, who again personally approved and drew a search warrant and an arrest warrant for a § 1309.1 violation; this time Petitioner was re-served with a notice, and the case was truly heard on the merits for the first time but not before Petitioner filed this suit including a prayer that the court below stop the proceeding in the County Court, which was promptly denied and affirmed by this Court.

As Lentini might have guessed from his prior luck, Judge Rothrock (even he found no double jeopardy at a preliminary hearing) threw the third summons out, holding that § 1309.1 BOCA Code did not apply to Petitioner's land.

Interspersed with Petitioner's arguments in the County Court were various civil suits and motions filed by him in the Fairfax Circuit Court where he repeatedly asked for orders to stop Respondent Lentini on the theory of double jeopardy. They were all denied. In fact, the usually adroit Petitioner became evasive and argumentative when he was asked in the trial below to name a single judge who had sustained his double jeopardy plea. The trial judge finally had to say, "The witness says he can't answer it."

Petitioner brought the action below against the Respondents for money damages and injunctive relief claiming a violation of his civil rights. Both sides filed, briefed, and argued respective Motions for Summary Judgment; and Judge Oren R. Lewis assigned a trial date on the day of the arguments. He then turned the case over to Judge Albert V. Bryan, Jr., who reviewed the briefs and, on the trial date, entered Summary Judgment for Respondents Keenan, Assistant Fairfax County Commonwealth's Attorney; and Shenk, a Fairfax County Special Magistrate. He denied Respondent Lentini's Motion for Summary Judgment, and he denied Petitioner's Motion for Summary Judgment.

The case was tried only as to Lentini; and, when Petitioner rested, Judge Bryan inquired of Petitioner's counsel what constitutional deprivation was complained of, and Petitioner's counsel answered "double jeopardy." Judge Bryan asked if counsel was sure that there was not some other claim Petitioner was presenting; but he was assured that, if Petitioner hadn't proved a double jeopardy violation, then, "We have no case." With that position unequivocably stated, Judge Bryan – with the flimsy evidence before him – had no alternative but to grant Respondent Lentini's Motion for Directed Verdict on the monetary damage claim.

Judge Bryan then asked if Petitioner wanted a decision on the injunctive relief claim based on the evidence heard thus far and was told by Petitioner's counsel, "Yes, sir." After securing a promise by counsel that Lentini would not proceed against Petitioner with any further § 1309.1 BOCA Code summonses, Judge Bryan dismissed the claim for injunctive relief.

The appeal to the United States Court of Appeals for the Fourth Circuit followed where a *per curiam* affirmance resulted; and now, Petitioner seeks this Court's assistance.

REASONS FOR DENYING THE WRIT

1. This Court has just spoken on prosecutorial immunity in *Imbler v. Pachtman* which renders the Petition moot.

In *Imbler v. Pachtman*, U.S.L. Week 4250 (U.S. Mar. 2, 1976), this Court addressed, for the first time, the 42 U.S.C. § 1983 liability of a state prosecuting attorney and concluded that he had absolute immunity from civil actions such as the instant case.

Respondent Keenan was the Fairfax County Assistant Commonwealth Attorney who had his first and only involvement with the Petitioner in reference to the third and last summons for a § 1309.1 BOCA Code violation.* Because he prosecuted the last summons, he was promptly sued by Petitioner – a frightening fact indeed. The Petitioner's logic seems to run like this: if you obtain a summons for me and if you prosecute me, I will sue you. It is hard to imagine how a system of meaningful justice could very long survive such an attack, and it is understandable why the courts have protected prosecutors as well as other judicial and quasi-judicial officers.

Mr. Justice Powell, in the *Imbler* decision, must have been thinking of this case when he penned the following:

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*Interestingly enough, Gary F. Davis, the Fairfax County Assistant Commonwealth Attorney who counseled Respondent Lentini and actually drew all three summonses, was not sued.

> The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. . . . Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law. *Id.* at 4255.

Since this Court has so recently enunciated *Imbler*, no meaningful reason can be advanced for reviewing the case at bar.

Petitioner's failure to complain in his Petition for a Writ about Respondent Shenk's prevailing in the Fourth Circuit, apparently reflects his agreement that a quasi-judicial officer, such as Respondent Special Magistrate, shares the immunity from § 1983 actions which is possessed by a judge. *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972). Respondent Shenk was the proverbial "guy in the middle" and surely has quasi-judicial immunity under the ruling in *McCray v. Maryland, supra.* Shenk was the special magistrate who issued the third summons at the direct order of Judge Martin Eugene Morris of the Fairfax County General District Court. The state courts, Judge Bryan, and the Fourth Circuit all refused to stay the hearing on the third summons; and such is proof perfect that Shenk was well within his rights and duties in issuing the summons.

Subjecting magistrates to lawsuits when they issue summonses is a highly questionable practice that could

have a disastrous effect on our system of justice and convert it into a system of "fear." Again, the fact that the trial court found no double jeopardy violation is further grounds for the Summary Judgment entered in Respondent Shenk's favor.

2. Oral argument before trial judge Bryan on the summary judgment motions was unnecessary under the facts and circumstances of this case.

Petitioner's complaint that trial judge Bryan not hear oral argument on the summary judgment motions he granted for Respondents Keenan and Shenk is without merit. First of all, *Imbler* makes the question moot; and, secondly, Judge Bryan had the motions before him as well as the affidavits of pertinent witnesses and extensive briefs of counsel. He read them and reached his decision, and the fact that he did not desire oral argument is not unusual for a trial judge as the federal rules specifically allow for the determination of motions without oral argument. Fed. R. Civ. P. 78; Local Rules of Prac. 11R, U.S. Dist. Ct., E.D. Va. (1973). *See, United States Fid. & Guar. Co. v. Lawrenson*, 334 F.2d 464, 467 (4th Cir.), *cert. denied*, 379 U.S. 869 (1964); *Spark v. Catholic University*, 510 F.2d 1277, 1280 (D.C. Cir. 1975).

3. Respondent Lentini was in good faith, and Petitioner was never placed in double jeopardy since he continued to violate the building code.

Petitoner's case against Respondent Lentini centered around the sole complaint that he was placed in double jeopardy because three summonses were issued for § 1309.1 BOCA Code violations.

The photographs in evidence speak for themselves, and no rational person can look at the junk, the debris, and the litter that lays over the hidden cellar – a trap for youngsters if ever there was one – and conclude that Petitioner should not remove it. But, even to this day, Petitioner's property remains in such a state; and it is easy for Petitioner to be oblivious to the problem as he does not live there.

Petitioner has reluctantly admitted that there was an old root cellar under the debris but said he had no knowledge of children being around it. Petitioner was forced to concede that his presence on the property was limited to the times of his various hearings. Exhibit D-4, a plat of the area, clearly showed housing subdivisions and a high school in the area.

Petitioner refused to remove his debris and appealed an order to do so to the Zoning Appeals Board; by Petitioner's own concession, the Board affirmed the order.

Petitioner then sued the county officials in the Fairfax Circuit Court and tried to persuade Judge Keith to stop the hearing on the first summons, but Judge Keith refused. Petitioner then filed another preliminary motion to prevent a hearing – this motion in the County Court itself; it was denied.

After the first summons was dismissed due to lack of evidence because the photographs were ruled inadmissible, Respondent Lentini sought a search warrant for photography purposes and a second summons. It should be noted, however, that he did that *only* after

the same was recommended, approved, and drafted by Fairfax County Assistant Commonwealth Attorney Gary Davis. (See Davis' Affidavit attached to Respondents' Motion for Summary Judgment) Again, Petitioner tried to stop the hearing by applying to the Circuit Court of Fairfax; and, again, Judge Keith denied him. Again, Petitioner sought to prevent a hearing on the second summons by asking the County Court to prevent it; again, the double jeopardy argument was made and rejected.

Finally, the second summons was heard, but Judge Hurst dismissed it because the notice of violation was not re-served. Again, Petitioner had argued double jeopardy to Judge Hurst; but he specifically ruled "no double jeopardy," and, in a letter to counsel, stated Petitioner was continuing to violate the law. (Ex. D-17) Indeed, Petitioner could not cite one judge that ruled there was double jeopardy that would prevent new summonses from being issued.

Then the third summons issued, by direct order of Judge Morris (Affidavit) and deposition of Judge Morris, p. 8; but Judge Rothrock, in a highly questionable decision, held BOCA Code § 1309.1 inapplicable to the type of land in question but not before he himself had found no double jeopardy and not before Judge Bryan and this Court had likewise refused to stop the third hearing.

Robert W. Wilson, the County Executive for the County of Fairfax, had never seen the photographs before, but when shown them, quickly testified that he would have wanted someone in the County to do something about the condition of the premises. When Petitioner's attorney asked Mr. Wilson if the photographs depicted a dangerous situation, he responded

that such was "very tempting for kids to go there and play."

The case against Respondent Lentini was limited solely to the allegation that Petitioner's double jeopardy rights were violated when Lentini obtained the second and third summonses. But every judge that has heard that argument has denied it, including Judge Rothrock, the same judge that ruled § 1309.1 BOCA Code inapplicable to Petitioner's land.

The BOCA Code, § 122.3 specifically says, "Each day that a violation continues shall be deemed a separate offense;" and the Virginia Uniform Statewide Building Code specifically incorporates the BOCA Code as the law of Virginia. Furthermore, the facts herein clearly show a continuing violation of § 1309.1; and the law seems clear that such separate offenses can be prosecuted. 22 C.J.S. *Criminal Law* § 281 (1961). *State v. Ell-Gee, Inc.*, 255 So.2d 542 (Fla. App. 1971); *Dapper v. Mun. Ct. San Diego*, 81 Cal. Rptr. 340 (Ct. App. 1959), *cert. denied*, 399 U.S. 910 (1970).

Petitioner insists that the first County Court trial found no offense committed by Petitioner in violation of § 1309.1. Better stated, Judge Whitestone had no evidence before him whereby he could find such a violation since he had ruled out the evidence; namely, the photographs of the rubble. Because it was a daily separate offense and because the Judge and Assistant Commonwealth Attorney Davis told him so, Lentini obtained a second summons which was heard by Judge Hurst, who dismissed the case, not because § 1309.1 wasn't being violated, but because Petitioner wasn't re-served with a notice of violation. Again, a judge told Lentini that there was a continuing violation, so he obtained the third summons but only after Assistant

Commonwealth Attorney Davis recommended the procedure and drafted the summons.

What would any reasonable official do if he were Lentini? Of course, he would follow judges' and prosecutor's advice and obtain a summons until the case was heard in full. If Lentini is guilty of anything, it is that, in this day and age of officials who so frequently do haphazard jobs, he cared about his job and the public he seeks to serve in an absolutely perfect display of good faith.

The *Imbler* decision should also apply to Respondent Lentini under the facts of this case because Lentini did nothing without first securing the authorization and direction of the Commonwealth's attorney's office in the guise of Gary Davis. Since Davis clearly has immunity under *Imbler*, Lentini should likewise have immunity since he did nothing without prosecuting attorney direction.

Concerning the prayer for injunctive relief, the injury contemplated must be "real, not fancied; actual, not prospective; and threatened, not imagined." 11 *Wright & Miller, Federal Practice and Procedure*, § 2942 (1973). Petitioner charges broadly and generally that, at some unknown date in the future he will be subjected to prosecution by the Respondents under an unspecified statute. Yet, Respondents' counsel expressly stated to the trial court that Petitioner would not be prosecuted under § 1309.1 under the same set of facts regarding the same property. This representation was incorporated into the trial court's Order of March 6, 1975, denying Petitioner's prayer for injunctive relief. Petitioner's allegations that he is threatened with irreparable injury are "nothing more than speculation about the future" which cannot serve as a basis for

injunctive relief. *Boyle v. Landry*, 401 U.S. 77, 81 (1971).

Petitioner lacks standing to ask for injunctive relief against enforcement of § 1309.1 BOCA because he cannot show "that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923), cited in *Poe v. Ullman*, 367 U.S. 497, 505 (1961). The fact that Respondents have expressly agreed not to prosecute Petitioner under § 1309.1 and have not threatened prosecution under any other ordinance, deprives this controversy of "the immediacy which is an indispensable condition to constitutional adjudication." *Poe v. Ullman, supra*, at 508. "If the prosecutor expressly agrees not to prosecute, a suit against him for injunctive relief is not such an adversary case as will be reviewed here." Id. at 507-08 citing *CIO v. McAdory*, 325 U.S. 472, 475.

Petitioner cites the statements of Respondent Lentini that, "I am going to scrutinize the code a little better" and "I will have to see what I can find in the Code" (Lentini deposition of January 30, 1975, p. 60) as the basis for his request for injunctive relief. But this isolated statement was not part of Petitioner's case in chief and is far short of the "clear threat of imminent prosecution(s)" which justifies court intervention and injunctive relief. *See, Poe v. Ullman*, 367 U.S. 497, 501, (1961) (prosecutor's statements, that, in course of his public duty, he intended to prosecute any offenses against state law did not constitute an immediate threat to plaintiffs in light of state's failure to prosecute).

The trial court's denial of injunctive relief was in accord with the broad discretion permitted trial courts in shaping equity decrees. See, 11 *Wright & Miller, supra*, citing *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). The fact that the appellate court reaches a contrary conclusion has been held not to warrant a reversal. *Id.* at § 2962. The scope of review is limited to determining whether the lower court abused its discretion. *Doran v. Salem Inn., Inc.*, 422 U.S. 922 (1975). 7 *Moore's Federal Practice* ¶ 65.04(2) (1975); and the trial court's findings of fact will not be disturbed unless clearly erroneous. *Wright & Miller, supra*, at § 2692; *Moore's, supra*, at ¶ 65.21.

CONCLUSION

For the reasons cited above, Respondents pray that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted
this day of April, 1976,

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